HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1325 OF 2002.

Mr. Dilip Moujeram Gaware.
Age : 31 years, Occu: Agriculturist,
R/a: Village Vitthalwadi,
Taluka- Shirur, Dist: Pune.
At present detained in Yerawada
Central Prison, Pune 411 006. ..Appellant.
versus.
The State of Maharashtra.
Through Office in Charge
Shikrapur Police Station, Pune. ..Respondent.

CORAM: S. B. MHASE &
R.S.MOHITE, JJ.

DATE: MARCH 29/30, 2007.

ORAL JUDGMENT (PER R.S.MOHITE,J.)

1. This appeal is filed by the appellant - Dilip Moujeram Gaware (hereinafter referred to as "the accused".) against the judgment and order passed by the 3rd Ad-hoc Additional Sessions Judge, Pune on 21.09.2002 in Sessions Case No. 94 of 2002. By the impunged judgment and order the trial Court has convicted the accused for an offence punishable under section 498-A of the Indian Penal Code, 1860 (hereinafter for the sake of brevity, referred to as "the IPC".) and sentenced him to suffer R.I. for two years and to pay a fine of Rs.1000/-, in default to suffer further R.I. for six months. The accused is further convicted for an offence punishable under section 302 of the IPC and sentenced to suffer imprisonment for life and to pay a fine of Rs.4,000/-, in default of payment, to suffer R.I. for one year. Both the substantive sentences have been

directed to run concurrently and set off under section 428 of the Code of Criminal Procedure, 1973 has been given.

2. The brief facts of the prosecution are as under:

(a) That, the deceased - Mangala was a daughter of Pw-2 Baban Khaire. She had married the accused on 26.4.1992. The marriage was an arranged marriage and in due course, from the said wedlock, the deceased begot a son by name Yogesh. For a period of three years after the marriage, the deceased was treated well by her in-laws. The family of the accused was residing at village Vitthalwadi, Taluka - Shirur, District- Pune. After a period of three years, the accused started harassing the deceased and used to beat her. The deceased complained to her father - Baban Khaire (PW-2), who tried to persuade the accused to behave properly. The accused, however, refused to listen. Therefore the deceased started to stay in her father’s house. She stayed there for a period of 2/3 years along with her son.

(b) About four years prior to the incident which occurred on 16.8.2001, deceased-Mangala went to attend the marriage of the brother of the accused.

After the marriage was over she voluntarily decided to stay on with the accused and resided there for about 3 months. During this period of three months, she used to visit her father to meet her family and her son - Yogesh who had continued to reside with his maternal grand father. She used to visit her father's house once a fortnight, and according to Pw.2, she used to tell him that her matrimonial life was going on smoothly. However, 15 days prior to the incident when Mangala came to meet her father, she told him that the accused had again started to ill-treat her. Pw.2 went to the house of the accused and tried to persuade him to behave properly. After having a talk with the accused he left his daughter at the house of the accused.

(c) That, the incident in question occurred on 16.8.2001. It is the prosecution case that on that day the accused entered into a quarrel with a neighbour by name Maruti Gaware. He came home and informed his wife (deceased - Mangala) about the quarrel and asked her to go and quarrel with said Maruti Gaware. Mangala refused on the ground that she did not know the reason for the quarrel. But when she informed this to the accused he got annoyed and abused Mangala. He beat her with his hands and thereafter he took a bottle of kerosene from the house, poured the kerosene on her back and set her

on fire with a matchstick taken from a matchbox in the home.

(d) As a result of the actions of the accused, the clothes of Mangala got fire and she suffered 48% burn injuries. Some of her neighbours removed her to the Sasoon Hospital, Pune where she was admitted in the burns ward. The record indicates that the accused did not bother to come to the hospital or attend to his wife. It is the defence of the accused that he was not present in the house at all.

(e) At about 11.30 pm. on the same day, i.e., 16.8.2001, a villager by name Laxman Gaware came to the house of PW-2 Baban Khaire and informed him that his daughter had received burns and had been admitted in Sasoon Hospital. Since it was night time and since Baban was staying in a village - Khairenagar and also since no vehicle was available he could not immediately leave for Sasoon Hospital, Pune. He. however started for Pune early on 17.8.2001 and reached the hospital at about 10.00 a.m.. He went to ward NO. 27 and saw his daughter. He found that she had received burn injuries on the right portion of her body from her shoulder downwards. She was concious and in a position to talk. He asked how she had received burns and thereupon she told him that on 16.3.2001, when she

had returned home from the field at about 7.00 p.m. accused followed her. At that time the accused had quarrel with one Maruti Gaware. Accused asked her to accompany him to pursue the said quarrel. When she refused, the accused got annoyed and poured kerosene on her person from behind and set her on fire with a matchstick. PW-2 Baban asked his wife, who had accompanied him to look after their daughter and on 17.8.2001 in the evening he went back to his village. On 18.8.2001 in the morning he went to the police station and lodged a complaint. The record indicates that the said complaint was lodged at about 4.55 p.m. on 18.8.2001 and that same was recorded by PW-6 - A.P.I. Shridhar Jadhav.

(f) API Shridhar Jadhav registered the crime under C.R.No. 89 of 2001 and thereafter visited the spot of the incident. There, in the presence of two witnesses, he drew a spot panchnama (Exhibit-10). The spot of the incident was the house of the accused, and at the spot he found a plastic bottle without a cap smelling of kerosene, one matchbox, two half burnt matchsticks and half burnt pieces of a saree. All these articles were seized under the aforesaid panchnama and sealed in the presence and under the signature of the panchas. On the same day he recorded the statement of Ramdas Gaware and several other witness. From the record, it appears

that on 17.8.2001 at about 10.20 a.m., Pw.2 Shankar Nivrutti Patil who was the Special Judicial Magistrate received a requisition letter from Sasoon Hospital Police Chowki for recording the dying declaration of Mangala. On receipt of the said requisition letter (Exhibit-21) Pw.4 Shankar Patil reached the hospital and went to Ward No. 27. He found that Pw.3 Dr. Pradip Tupare was on duty in Ward No. 27. He showed the requisition letter to the Doctor and informed him that he intended to record the dying declaration of Mangala. Dr. Tupare took him near the cot of Mangala. The Special Judicial Magistrate - Shankar Patil enquired from the Doctor as to whether Mangala was in a position to give a statement. Dr. Tupare gave a written certificate on a blank piece of paper which was to be used for recording the dying declaration, stating therein that the patient was concious and well oriented and was in a position to give a statement. Thereafter, Special Judicial Magistrate Shankar Patil recorded the dying declaration of Mangala. After putting some formal questions to her in order to assess her ability to respond, he questioned her how she had received burn injuries. She informed him that on the earlier night her husband was present at home, she had just returned from the field and was in the process of igniting the fire hearth to prepare food. At that time, her

husband had drunk liquor. He asked her she should quarrel with neighbour Maruti Gaware as the said person had quarrelled with him. Mangala refused to join the quarrel with Maruti as she was not aware of the cause of their quarrel. Hence the accused got annoyed. He abused her and assaulted her by his hand. Thereafter he took a kerosene bottle and poured the entire contents of the bottle on her back and set her on fire with a matchstick. She informed the Magistrate Patil that her husband was addicted to liquor and at the time of the incident though he had consumed liquor, he was fully concious. The entire statement was read over to Mangala. According to the Magistrate Patil, Mangala had a deformation on her palm and had six fingers (two right thumbs). He obtained the thumb impressions of both her thumbs on her dying declaration and on the dying declaration itself he made an endorsement about her having two thumbs as well as taking both impressions. The dying declaration which had commenced at 10.30 a.m. concluded at 10.55 a.m., and thereafter Magistrate Patil obtained a further endorsement of Doctor Tupare to the effect that the statement was given in his presence and recorded by Magistrate Patil in his presence.

(g) on 18.8.2001 the Investigating Officer API Shridhar Jadhav arrested the accused at about 6.30 p.m.. The

arrest was effected under an Arrest Panchnama (Exhibit - 29) in the presence of two independent panchas. On 18.8.2001 the Investigating Officer received the dying declaration of Mangala recorded by the Magistrate. On 19.8.2001 he recorded the statement of Kamalabai and three other witnesses. On 20.8.2001 the Investigating Officer submitted a report to the Circle Officer of Talegaon Dhamdhere to draw a sketch of the place of incident. Accordingly, a Sketch at Exhibit 30 was drawn. On 21.8.2001 Mangla died due to complications arising from her burns. Her body was sent for post mortem . The post mortem indicates that 48% burns were found and the cause of death indicated was complications due to burns.

(h) On 22.8.2001, the Investigating Officer. along with his forwarding letter dated 22.8.2001, sent the articles which had been seized, for chemical analysis. On 11.9.2001 he received the post mortem notes. On 18.10.2001 API Kshirsagar recorded the statements of five witnesses and on 29.10.2001 API Kshirsagar filed a charge sheet against the accused in the Magistrate’s Court. Subsequently during the trial Chemical Analyser’s report was received on 3.4.2002 and same was also filed in the Court.

3. In due course, the case was committed to the

Court of Sessions. A charge came to be framed under Section 498-A and 302 of the IPC. In order to prove its case the prosecution led the evidence of seven witnesses. Pw.2 was Baban Khaire, the father of the deceased was examined to prove the motive and the making of an oral dying declaration by the deceased to him. Pw.4 the Special Judicial Magistrate was examined to prove the dying declaration (Exhibit 17) made by the deceased on 17.8.2001. Pw.3 - Dr.Tupare was examined to prove two endorsements made by him on the dying declaration. Pw.5 Sudhakar Belsare was examined to prove the post mortem notes (Exhibit 29). Pw.1 Bapu Gaware was examined to prove the spot panchnama Exhibit-10. Pw.6 P.I. Shridhar Jadhav was examined as he was the investigating Officer and Pw.7 ASI Subhash Rane was examined to prove the receipt of a message from the Sasoon Hospital. Chemical Analyser's report was produced on record and Arrest Panchnama (Exhibit-29) was proved through the Investigating Officer. From the suggestions made to the various witneses, the defence of the accused appears to be of total denial. He claimed that he was not present at the house when the incident took place. It is further the defence of the accused that the deceased caught fire accidentally when she was igniting the hearth for the purpose of cooking food. After taking into account the oral and documentary evidence produced by the prosecution, the trial Court convicted and sentenced the accused as aforesaid. In

these circumstances the appeal was filed by the accused.

4. We have heard both sides and perused the entire record. In our view the appeal requires to be partly allowed by setting aside conviction under section 498-A of the IPC. The conviction and sentence of the accused under section 302 of the IPC will, however, have to be retained and confirmed for the reasons mentioned hereinbelow.

(a) It is well settled law that a dying declaration, if found reliable and acceptable, can by itself form the basis of a conviction. We find no reason to discard the dying declaration of Mangala recorded between 10.30 a.m. and 10.55 a.m. by PW-4 Special Judicial Magistrate - Shankar Patil. The evidence of Shankar Patil clearly indicates that he had received the police requisition at about 10.00 a.m. and thereafter immediately he had been to Sasoon Hospital. There he enquired with Pw.3 -Dr. Tupare about the condition of Mangala and obtained the endorsement of Doctor on a blank sheet of paper on which he intended to record the dying declaration, to the effect that Mangala was conscious and is in a position to give a statement. He thereafter recorded the statement of Mangala in which she implicated the accused as set out hereinabove. After recording the statement of Mangala, he obtained the thumb impressions of the thumb of right hand as well

as of an abnormal second thumb. The fact that Mangala had two thumbs and that Pw.4 (Spl. Judicial Magistrate - Shankar Patil) had taken the imprints of both the thumbs of her right hand is mentioned in the dying declaration itself, and this endorsement is a contemporary endorsement taken at the time of recording of the dying declaration. Even thereafter at about 10.55 a.m., after completion of the recording of the dying declaration, Pw.4 took a second endorsement of Pw.3 (Dr. Tupare.) to the effect that the statement of Mangala had been recorded in his presence by the Magistrate (Pw-4). The entire deposition of Pw.4 Magistrate (Shankar Patil) is corroborated by the evidence of Pw.3 (Dr. Tupare) who proves his two endorsements on the document, and in fact states that he himself heard Mangala stating that it was the accused who had set her on fire.

. As regards this written dying declaration of Mangala, it was sought to be argued on behalf of the accused that PW-4 Special Judicial Magistrate- Shankar Patil had stated in his evidence that nobody else was present when the same was recorded. Our attention is drawn to the evidence of Pw.2 Baban Khaire, wherein in the cross examination it has been elicited that from 10.00 a.m. to 1.30 p.m. Baban, his wife and two relations of the accused were present near Mangala but nobody had come to see her. We find that this statement

is vague. There is no specific question put about the non recording of the dying declaration by the Special Judicial Magistrate (Pw-4). Even in his examination-in-chief he has stated that he had come to the hospital at about 10.00 a.m.. It is quite possible that the dying declaration may have been recorded earlier in point of time of his arrival in Ward No. 27.

(b) The prosecution then relies upon the oral declaration made to PW.2- Baban Khaire i.e., her father at the hospital on 17.8.2001. Pw.2 states in his evidence that on 16.8.2001 a person by name Laxman had come to his residence at about 11.30 p.m. and informed him that his daughter has received burns and had been admitted to Sasoon Hospital. Since it was night time no vehicle was available. He went to hospital on 17.8.2001 and reached at about 10.00 a.m.. He went to Ward No. 27 and saw his daughter. He found that his daughter was concious and in a position to talk. He asked her as to how she received burn injuries. Thereupon she told him that on 16.8.2001 when she had returned home at about 7.00 p.m. the accused had a quarrel with Maruti Gaware who was the resident of the same village and had asked her also to quarrel with Maruti. Mangala had refused and had told him that she would accompany him in the morning. The accused had got annoyed and thereafter had poured kerosene on her person from behind and set her on fire with a matchstick. In his cross examination it was

suggested to him that his daughter had told him that she had accidentally got fire while igniting the hearth. This suggestion was denied by him. There is nothing in the cross examination which casts any doubt on the version relating to the dying declaration given by this witness in his evidence. The version given by him also finds place in his FIR filed on 18.8.2001 at about 4.35 p.m. The advocate for the accused stated that the FIR was belated and hence the corroboration from the FIR is of little value. We are unable to agree that the FIR is unduly delayed.

. We cannot lose sight of the fact that Mangala was still alive and had suffered only 48% burns. The question of her future hung in balance, and it is quite possible that her father- Baban must have been worried about her future in case she survived, particularly when she had young child Yogegh whose future was also under a cloud. Besides, his daughter Mangala was grievously injured and therefore it was natural for Pw-2 Baban to remain with his daughter on 17th August 2001. It is possible that after deep contemplation he must have decided to approach the police. The late lodging of the FIR, by itself, therefore is not a circumstance which would caste a doubt or reduce its corroborative value.

(c) Apart from the aforesaid, the defence of the accused that Mangala accidentally caught fire while

igniting the hearth does not appear to be true. When the accused was arrested on 18.8.2001, his shirt and pant were seized and wrapped in a piece of paper bearing the panchas signature. This was subsequently sent by the police to the Chemical Analyser and Chemical Analyser's Report indicates that there were traces of kerosene on the clothes of the accused. Apart from this, a piece of burnt saree was seized from the spot of offence. This piece of burnt saree, according to the prosecution belongs to Mangala. This sealed article was also sent to the Chemical Analyser. Traces of kerosene were found on the burnt saree piece of Mangala. In our view if Mangala had suffered accidental burns, there was no reason for traces of kerosene to be found on the clothes of the accused and on the burnt saree piece belonging to Mangala. The finding of an empty bottle of kerosene in which traces of kerosene were found at the scene of the offence and two half burnt matchsticks, also corroborate the written and oral dying declaration made by Mangala.

. In the aforesaid circumstances we find there is sufficient material to convict the accused for the offence punishable under section 302 of the IPC. However, in our considered opinion the conviction of the accused under section 498-A of the IPC is untenable, as there is insufficient evidence relating to cruelty within the meaning of Section 498-A of the IPC. The

evidence of PW-2 (Baban Khaire) indicates that Mangala had gone back to her husband's house on her own accord about 4 months prior to the incident. No doubt he states that 15 days prior to the incident she complained about ill-treatment but this evidence is not admissible under section 32 of the Indian Evidence Act as it is not pertaining to the cause of Mangala's death and cannot be pressed into service by the prosecution to obtain a conviction for an offence punishable under section 498-A of the IPC. No statement of any neighbour is recorded to indicate any ill-treatment. There is no allegation of payment of dowry. From the dying declaration of Mangala which we have accepted, it is clear that the quarrel which led to her burning took place over a very minor incident relating to a quarrel with a person residing in the same village. The written dying declaration indicates that the accused was under the influence of liquor but was fully concious. In the circumstances, we are inclined to set aside the conviction and sentence of the accused for an offence punishable under section 498-A of the IPC.

. In the result, following order is passed:

(a) The conviction and sentence of the accused, namely, Mr. Dilip Moujeram Gaware, for the offence punishable under section 498-A of the IPC is quashed and set aside and

he is acquitted of the said charge. The fine imposed upon the accused by the trial Court, if already paid by the accused, will be refunded to him.

(b) The conviction and sentence of the accused, namely, Mr. Dilip Moujeram Gaware for the offence punishable under section 302 of the IPC as imposed by the trial Court in the impugned judgment and order is confirmed.

(c) Accused shall be entitled to set off under section 428 of the Code of Criminal Procedure, 1973.

(d) Appeal stands partly allowed accordingly and is disposed off.

(R.S.MOHITE, J.) **(S.B.MHASE, J.)**